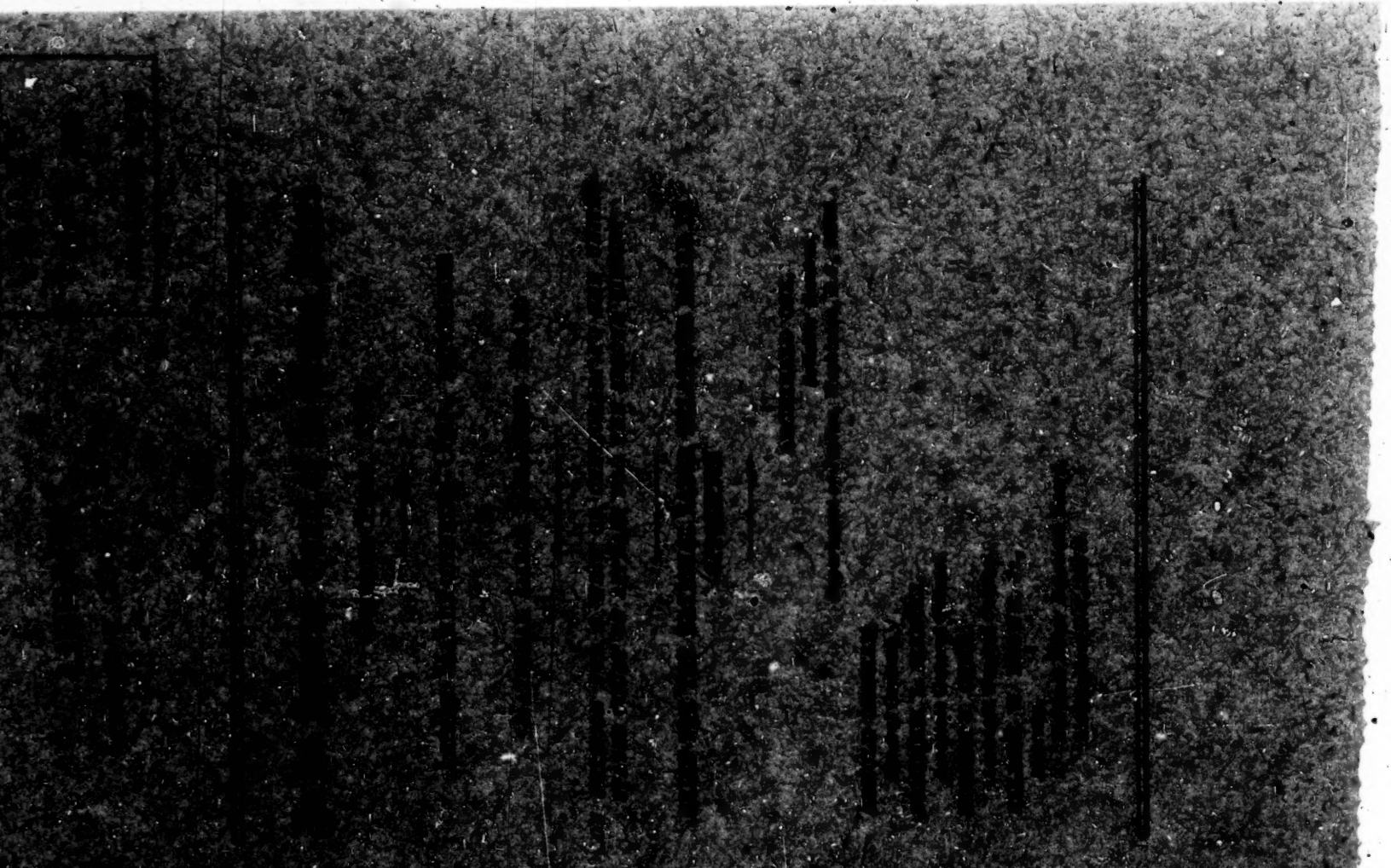

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705-030—63

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 350

LUNDY MANUFACTURING CORP., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–13a) is reported at 316 F. 2d 921. A prior opinion of the court of appeals in the same proceeding is reported at 286 F. 2d 424. The initial findings of fact, conclusions of law and order of the board (B.A. 2–72)[1] are reported at 125 NLRB 1188. The Board's supplemental decision and amended order (S.A. 2–48, Pet. 14a–23a) are reported at 136 NLRB 1230.

[1] "B.A." references are to the appendix to the Board's brief filed for the use of the court of appeals at the time of the initial proceeding before it. "S.A." references are to the supplemental appendix filed with the court of appeals at the time of the second proceeding. References preceding a semicolon are to the Board's findings, and succeeding references are to the supporting evidence.

JURISDICTION

The decision of the court below (Pet. 1a–13a) was rendered on April 26, 1963, and its decree was entered on May 15, 1963 (Pet. 1). The petition for a writ of certiorari was filed on August 7, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board properly concluded that petitioner violated Section 8(a)(1) of the National Labor Relations Act by refusing to meet with an *ad hoc* grievance committee selected by a majority of its employees at a time when the recognized union's grievance machinery had ceased functioning.

2. Whether the court of appeals enforced the Board's order on grounds different from those relied upon by the Board.

3. Whether Section 10(b) of the National Labor Relations Act prohibits the Board from considering events which have taken place prior to the six-month limitations period in determining the appropriate remedy for an unfair labor practice which has been committed within the limitations period.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are set forth at pp. 3–4 of the petition.

STATEMENT

Petitioner is a manufacturer of actuators, motors, air valves, and related products. Its employees were not represented by any collective bargaining agent

until May 1957. At that time petitioner signed a collective bargaining agreement with Amalgamated Local 355. Local 355 was a union which Robert C. Barbato, petitioner's president, had selected, and which either did not represent a majority of petitioner's employees or which, if it did represent a majority of the employees, had achieved its majority status as a result of coercion exerted by Barbato (B.A. 14–21; 78–80, 85–90, 146–147, 204–205, 223–226, 257, 265–268, 276).[2] In July 1958, during negotiations over a renewal of the contract, certain of petitioner's employees resolved to disaffiliate from Local 355 and to affiliate with the International Union of Electrical Workers ("IUE") (B.A. 28–29; 111–113, 124, 129–130, 136, 149, 202, 282). Three employees were discharged by petitioner at that time as a result of their activities in furtherance of the disaffiliation movement (B.A. 35–63).[3] Thereafter, the new contract was ratified by a vote of 22 to 13, with 22 employees abstaining (B.A. 32; 99–100, 154–155). The new contract, which, like the earlier contract, contained a

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[2] Petitioner apparently concedes, for purposes of this petition, that the evidence before the Board supported its conclusion in this regard (Pet. 4). When it remanded the case to the Board on other grounds, the court of appeals expressly found the evidence to be sufficient to support this conclusion, 286 F. 2d at 425.

[3] Petitioner does not challenge here, as it did in the court of appeals, the sufficiency of the evidence in the record as a whole to support the Board's finding that these discharges were discriminatorily motivated in violation of Sections 8(a)(3) and 8(a)(1) of the National Labor Relations Act, and that they also amounted to unlawful assistance to Local 355 in violation of Section 8(a)(2).

union security clause, was to run until June 30, 1961 (B.A. 291–293). It also provided for grievance machinery through a committee of shop stewards (S.A. 17).

On April 11, 1960, the stewards who were on the grievance committee resigned, and the committee ceased functioning (S.A. 17–18; 129–131, 136–137, 185–186). When one of the employees complained that morning about the odor produced by a machine in the plant, there was no committee to process his grievance (S.A. 18–10; 53-54, 129–131, 136–137, 170–171, 183–186). Another employee who brought the grievance to the attention of the plant manager was discharged for disrupting work (S.A. 19–20; 106–110, 133–134).

Several employees decided to protest the discharge by refusing to work the next morning (S.A. 20; 56–57, 110–111, 134–135). Barbato saw the employees in the parking lot on April 12 and suggested that they return to work and select a committee to discuss the discharge (S.A. 20; 56–58, 111–113, 134–135). Later in the morning, the committee met with Barbato, and the discharge was reduced to a one-day layoff. In the course of the meeting, Barbato suggested that the employees selcet a committee to handle grievances that might arise in the future (S.A. 20; 58–59, 136–137, 186).

In accordance with Barbato's suggestion most of the employees attended a meeting at noon on April 12 at which a grievance committee of seven members was elected (S.A. 21; 60–62, 79–82, 114, 137–138). Two of the committee members had manifested sup-

port for the IUE, two were members of Local 355 who had not signed IUE cards, and the affiliation of the remaining three is not disclosed by the record (S.A. 23; 60, 112, 128, 146). When Barbato saw the committee, he refused to meet with it because its members "were too much inclined to be in favor of the IUE" (S.A. 22; 62–63, 115–116, 139, 171–172).

Another employee meeting was held on April 18, and it was attended by about 95 of petitioner's 120 production and maintenance employees (S.A. 23; 64–66, 120, 140–141, 208). The employees voted unanimously to maintain the grievance committee which had been selected and to strike if petitioner refused to deal with it (S.A. 23–24; 65–69, 118, 140–141). Thereafter, despite the committee's attempt to convince petitioner that its sole purpose was to represent the employees' interests and that it was "free of any outside influence," petitioner continued to refuse to meet with it (S.A. 24–25; 67–69, 118–120, 143). Instead, petitioner posted notices informing the employees that a new wing of the plant would be available for a meeting on April 19, at which time the employees could elect a different grievance committee (S.A. 24–25; 70–71, 200). These notices were torn down by the president of Local 355, who maintained that he would recognize no committee other than one elected "by our own people" (S.A. 25; 141–143, 152–154, 187–188). Petitioner's plant manager informed the *ad hoc* committee on April 19 that he had been instructed not to recognize the committee as constituted, although the petitioner would be willing to recognize any other committee with different membership (S.A. 24; 68, 120).

On April 20 about 80 of petitioner's employees went on strike (S.A. 25–26; 70, 120, 173–174). On April 21 the president of Local 355 called a meeting which was attended by about 40 employees. He termed the strike a "wildcat one" and urged the employees to cross the picket lines. At his suggestion a Local 355 grievance committee was selected (S.A. 28; 131–132, 154–156). During the strike one employee who returned to work was discharged upon the demand of Local 355 (S.A. 29–30; 150–151, 156–157, 176–177).

On May 3 the strikers agreed to return to work (S.A. 30–31; 72–73, 86–87, 93–94, 121–122, 177–178). All who applied for reinstatement were taken back by petitioner with the exception of six employees. Three of these employees were members of the *ad hoc* grievance committee. The others were employees who had been active either in the effort to disaffiliate from Local 355 or in the strike (S.A. 31–33; 73–74, 87–88, 90–105, 122–123, 144–145, 177).

Based on the foregoing, the Board concluded that in July 1958 petitioner had discriminated in violation of Section 8(a)(3) of the Act by discharging the three employees for supporting the IUE, and that it had assisted Local 355 in violation of Section 8(a)(2) and had interfered with employee organizational rights in violation of Section 8(a)(1) by these discharges, and by other acts not relevant in the present posture of the case.[4] The Board also

[4] The Board originally found that petitioner had further violated Sections 8(a)(2) and (1) of the Act by maintaining a contract with Local 355 which contained an illegal union secu-

concluded that, by refusing to deal in April 1960 with the employee grievance committee, petitioner had violated Section 8(a)(1) of the Act and had assisted Local 355 in violation of Section 8(a)(2); that the strike which ensued was caused by these unfair labor practices; and that by refusing to reinstate six strikers and by discharging another, petitioner had again discriminated in violation of Section 8(a)(3) (S.A. 5, 33–39).[5]

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rity clause, on the ground that the contract had been entered into at a time when that union did not represent an uncoerced majority of the employees, and that this violation had been repeated when petitioner entered into a new contract with Local 355 on July 31, 1958, at a time when the majority status of that union was still tainted and when a question concerning representation (raised by the petition filed by the IUE) was pending before the Board (B.A. 33–34). However, Local 355's lack of a *bona fide* majority could only be established by events which occurred prior to January 31, 1958 (six months before the service and filing of the charge forming the basis for the unfair labor practices found by the Board). This Court in *Local Lodge No. 1424* v. *National Labor Relations Board*, 362 U.S. 411, held that Section 10(b) of the Act precluded the Board from impeaching a contract, valid on its face, on the basis of events falling outside the six-month limitations period imposed by that section. Accordingly, when that case first came before the court of appeals, it remanded the case to the Board for reconsideration in the light of *Local Lodge No. 1424*. 286 F. 2d 424. After such reconsideration, the Board concluded that it could no longer find that the maintenance of the 1957 contract and the execution of the 1958 contract constituted unfair labor practices. But it reaffirmed its other unfair labor practice findings (S.A. 4–5).

[5] These unfair labor practices were based upon separate charges filed in 1960 (S.A. 1). When the case based on the earlier charges was remanded to the Board by the court of appeals (n. 4, *supra*), the Board consolidated both cases and rendered a single decision and order (S.A. 2).

In addition to the standard cease-and-desist order, the Board, relying upon the "background evidence" which demonstrated that petitioner had coerced its employees into designating Local 355 as their bargaining agent, ordered petitioner to withhold recognition from Local 355 until it had been certified by the Board as the exclusive bargaining representative of petitioner's employees (S.A. 5–7, 9–10). The court of appeals granted enforcement of the Board's order, finding it unnecessary to decide whether the Board was correct in holding that petitioner had violated Section 8(a)(2) by refusing to meet with the *ad hoc* grievance committee (Pet. 12a, n. 3). The court based its decision that Section 8(a)(1) had been violated on the examiner's finding (adopted by the Board) that "Local 355 had no [grievance] committee functioning at the plant at the time in question" (Pet. 11a). It also sustained the scope of the Board's order.

ARGUMENT

Petitioner seeks review in this Court of only two of the many disputed issues in this case. However, the questions which petitioner presents were correctly decided by the Board and the court of appeals, and their decisions are consistent with the principles heretofore announced by this Court. There is no conflict of decisions, nor is there any other reason for further review of any aspect of this case.

1. Petitioner does not challenge the Board's findings, sustained by the court of appeals, that it violated Sections 8(a) (1), (2), and (3) of the Act in July 1958. Nor does it disagree with the Board's

conclusion that, if petitioner's refusal to meet with the *ad hoc* grievance committee was an unfair labor practice, then the discharges which resulted from the strike which followed such refusal constituted violations of Sections 8(a)(3) and 8(a)(1). Petitioner does contend, however, that the refusal to meet with the committee was not a violation of Section 8(a)(1).

This argument is based upon the premise that, at the time the grievance committee sought a meeting with petitioner's president, an existing collective bargaining agreement required petitioner to recognize Local 355 as the exclusive bargaining agent for its employees. It overlooks the critical fact, which the hearing examiner found, the Board adopted, and the court of appeals sustained, that "Local 355 had no [grievance] committee functioning at the plant at the time in question." This finding is buttressed by the conduct of petitioner's president, who recognized that there was no existing grievance machinery and suggested to the employees that they elect a committee.

Section 7 of the Act guarantees employees the right to engage in concerted activities for their mutual aid or protection. This right is reinforced by the proviso to Section 9(a), which reserves to groups of employees "the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect." Recognition of the *ad hoc* grievance committee would not have been inconsistent with the terms of petitioner's contract

with Local 355 since the grievance committee established by the contract was no longer in existence. And, as the court of appeals observed, after 95 of petitioner's 120 employees had met and unanimously backed the committee, petitioner could no longer justify its refusal to meet with the committee on the grounds that the committee was not representative of its employees (Pet. 11a-12a). Indeed, petitioner's announced willingness to deal with any committee other than the one which had been elected belies its present claim that it was seeking to protect the exclusive rights of Local 355.

Nor is there any merit to petitioner's claim that the court of appeals based its decision on grounds different from those stated by the Board. The trial examiner's intermediate report was filed before the earlier case against petitioner was remanded by the court of appeals. See note 4, *supra*. Accordingly, the trial examiner based his conclusion not only on the fact that the Local 355 grievance committee was inoperative as of April 11, 1960, but also on the Board's ruling in the earlier case that the contract with Local 355 was invalid (S.A. 33-34). The Board then consolidated the case which the trial examiner had considered with the case which had been remanded by the court of appeals, and it disposed of both in a single opinion. It first reversed its earlier findings that the recognition of Local 355 and the contracts with it constituted unfair labor practices (S.A. 4-5). It then summarily agreed with the trial examiner's conclusions that petitioner had committed violations of Sections 8(a)(1) and 8(a)(3) with regard to the

grievance committee (S.A. 5). The only reasonable construction of this ruling is that the Board *sub silentio* removed one prop upon which the trial examiner's conclusion rested and adopted the other. Hence the court of appeals was agreeing with the Board's laconic disposition (albeit wishing that "the Board had explained its position more thoroughly") when it said:

> Despite the recognized status of Local 355 and the existence of the collective bargaining contract, the examiner reasonably, found that "Local 355 had no [grievance] committee functioning at the plant at the time in question." In this vacuum the employees were not required to rest their § 7 rights on the hope that when a grievance arose, the individual employee affected would somehow manage to obtain a hearing, which the employee discharged on April 11 had obtained only through a work stoppage. [Pet. 11a.]

2. Equally without substance is petitioner's objection to the scope of the Board's remedy. This Court has sustained orders which have followed violations of Section 8(a)(2) and which have directed that recognition be withheld from an unlawfully assisted union until after election and certification. *E.g., National Labor Relations Board* v. *District 50, United Mine Workers*, 355 U.S. 453, 459. In the present case, petitioner does not challenge the Board's finding, which was upheld by the court of appeals, that it violated Section 8(a)(2) in July 1958, when it discharged the three employees who were actively urging disaffiliation with Local 355 and affiliation with the

IUE. Consequently, it was entirely appropriate for the Board to invoke its usual remedy in such cases and require a new election.

It is true that the Board, in assessing the seriousness of petitioner's unfair labor practices and the need for the remedy imposed, took "into consideration the background evidence, showing that [petitioner] coerced its employees into designating Local 355 as their collective bargaining representative, and that Local 355 never was their free choice" (S.A. 6–7). Although Section 10(b) forbids basing any unfair labor practice findings on this evidence, since it pertained to matters which occured more than six months before the charges were filed and served, it does not foreclose the use of such evidence in fashioning an appropriate remedy. Section 10(b) merely provides that "no complaint shall issue *based upon any unfair labor practice* occurring more than six months prior to the filing of the charge with the Board * * *." (Emphasis added.) In *Local Lodge No. 1424* v. *National Labor Relations Board*, 362 U.S. 411, 416, this Court recognized that, even when the Board is engaged in deciding whether an unfair labor practice has been committed, "earlier events may be utilized to shed light on the true character of matters occurring within the limitations period." As the court below stated, "It follows *a fortiori* that in such a situation the Board may look to earlier events to determine the appropriate remedy to be prescribed * * *" (Pet. 13a).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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